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No. 95-974

In The Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park
Petitioners

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
Respondents

On Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS' POSITION

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INTEREST OF THIS AMICUS CURIAE

Why this amicus brief? Because the writer was impressed by conversations he had in his youth with two veterans of the Civil War: his grandfathers. He views the Fourteenth Amendment as the keystone to reconstituting the Union, designed to satisfy the eleven northern states that they had not fought in vain, while offering each of the southern states something they could accept with confidence that their sovereignty would not be unduly impaired.

Would the northern states have proposed the amendment if they had thought it meant giving up any of their Tenth Amendment rights? And would the southern states have re-entered the Union if they had thought the price included forfeiture of their protection under the reservation of powers the Tenth Amendment seemed so clearly to furnish? How could they possibly have foreseen the doctrine of "incorporation," or "assimilation," coupled to such an extension of "freedom of speech"?

This brief attempts to illumine the law of the constitution from the **linguistic** aspect. This is novel. Integrity of the language has been the writer's lifetime interest. Accordingly, the argument will lean heavily on 18th and 19th century practices in verbalization. How were the words and phrases, as then used, understood by the congress, and by the conventions and state legislatures that ratified the amendments?

The linguistic approach is simple. Words are supreme. How were they read and heard and

understood at the time by the people **generally** who read and heard them and who intended to govern and be governed by them?

Two eras are involved: the eighteenth century, for which we must depend upon modern computer technology, and the eighteen sixties, when the 1864 Webster's American Dictionary of the English Language became almost an official government publication. This method of analysis leads to the conclusion that it is not the First Amendment that controls (as contended the appellee), but the Tenth. At issue is the balance between the national power and that of the states.

I. "FREEDOM OF SPEECH" IS A PHRASE OF DOUBTFUL MEANING.

To make her case, Ms. Yniguez must show that Article 28 of the Arizona state constitution somehow abridges "the freedom of speech" protected against Congressional abridgment by Article 1 of the federal constitution.

"The freedom of speech" is not a comprehensible phrase generally understood to signify some one identifiable concept. From the beginning our choices have been limited. We might have ignored it altogether as being unconstitutionally vague. Alternatively, we can now attribute to it the narrowest significance justifiable to the greatest number of people affected. That in short seems the view that the phrase does away with prior restraint in trials for seditious libel. To the extent we have gone further, a reappraisal is timely and this case from Arizona is a fitting vehicle.

Professor Leonard W. Levy in 1960 was clearly of the opinion that:

> we do not know what the First Amendment's freedom of speech-and-press clause meant to the men who drafted and ratified it at the time[s] that they did so.

He himself felt it "embodied the Blackstone definition and left the law of seditious libel in force," not that it superseded the common law. Leonard Levy, Legacy of Suppression, The Belknap Press of Harvard University Press, 1960, pages 247 and 248.

Surely "the freedom of speech" does not eliminate perjury in the federal courts or before the Congress. Nor can it be supposed to do away with the Judeo-Christian prohibition "Thou shalt not bear false witness against thy neighbor." (Deuteronomy 4, 13; St. Matthew 22, 36.) The phrase is not an absolute, and its application must therefore be confined to the minimum limits required to give it any significance at all. Even congress has not dared to go further under the "necessary and proper" clause. The Court below, however, has undertaken to sit as a "Committee on Revision" and rewrite the Constitution, oblivious to the rejection of any such idea during the convention at Philadelphia. (Documents of the Constitution, Government Printing Office, 1938, page 548)

Modern technology (specifically, computers tied to huge data bases) has enabled powerful lexicographers to search the past in depth and in breadth to furnish new insights into old laws. Thus in the 1987 edition of

the Random House Dictionary of the English Language, page 763, we find this definition of freedom of speech:

> the right of people to express their opinions publicly without interference, subject to the laws against libel, insurrection, violence, or rebellion, etc. Also called free speech. (1940-45)

That is indeed how the words were commonly understood in the pre-constitution era. Two state constitutions tied speech to "**sentiments**." The Pennsylvania constitution of September 28, 1776 (Article 12) declared: "That the people have a right to freedom of **speech** and of writing, and publishing their **sentiments**; therefore, the freedom of the press ought not to be restrained."

The Vermont constitution of July 4, 1786 (Article 15) declared:

> That the people have a right of freedom of **speech** and of writing and publishing their **sentiments**, concerning the transactions of government - and therefore the freedom of the press ought not to be restrained.

And in Article 16:

> The freedom of deliberation, **speech**, and debate, in the legislature, is so essential to the rights of the people, that it

> cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.[1]

Sentiment is thus defined in Webster's American Dictionary of the English Language (1828):

> 2. In *a popular sense,* thought; opinion; judgment; the decision of the mind formed by deliberation or reasoning. Thus in deliberative bodies, every man has the privilege of delivering his *sentiments* upon questions, motions and bills. (Italics in original.)

The first congress in 1789 did in fact consider - but rejected - a proposal to forbid states from infringing freedom of speech. The history is set out in "Creating the Bill of Rights: the Documentary Records from the First Federal Congress" published by Johns Hopkins University Press in 1991. Proceedings in the House committee of the whole are reported on page 188, proposing to insert "no **state** shall infringe the equal rights of conscience, nor the freedom of **speech**, or of the press, nor of the right to trial by jury in criminal cases."

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[1] Thurston Greene, The Language of the Constitution (A Sourcebook and Guide to the Ideas, Terms, and Vocabulary Used by the Framers of the United States Constitution) (with foreword by Warren E. Burger), pages 801-802. This book was contributed by the author of this brief to honor the Bicentennial of the United States Constitution in1991.

As presented to the Senate on September 4, 1789, however, the proposal read:

> that **Congress** shall make no law abridging the freedom of **speech** or the right of the People peaceably to assemble and consult for their common good and to petition the government for a redress of grievances.[2]

That was passed. Somewhere along the way, the proposal respecting the states faded away. Nor should it be revived without amending the Tenth Amendment.

Recently, in a less linguistically minded world, there have been deviations from the earlier simplicity. Perhaps an excess of enthusiasm has converted into a legal aphorism what began as no more than a catchword, a concept of uncertain content, an abstraction, a figure of speech. Congress has not attempted a broader definition. In consequence, "freedom of speech" (but for the Pennsylvania and Vermont constitutional usages above-quoted) is no closer to being a legal aphorism than the "freedom of the seas" slogan that played so important a part in precipitating our entry into the first world war upon the sinking of the Lusitania.

Ms. Yniguez's activities fall wide of the mark she strives to score on.

[2] Documentary History of the First Federal Congress, Vol. I, Johns Hopkins University Press (1972), page 153.

II. THE FOURTEENTH AMENDMENT OFFERS NO HELP TO MS. YNIGUEZ.

The 39th Congress made no effort to revive the proposal that "abridgment of freedom of speech" be extended to the states (supra, pages 5 and 6). Nor were any of the "abridgment" restrictions extended to the states through incorporation **by reference**, although linguistically it would have been easy to do so. Two old rights were reworked: "due process" and "privileges and immunities."

1. Due Process

The "due process" clause was repeated verbatim, with the prohibition on abridgment being made expressly applicable to the states. The term "due process" was not invented in Philadelphia. Except for the specific enumeration of protections, it could have meant no more, no less than what it meant in the plain language of the English Petition of Rights in 1628.

> [N]o man of what estate or condition that he be, should be put out of his lands, nor tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law.[3]

This was a substantive right to a procedural safeguard. Two hundred sixty years later this great bulwark against oppression stood unaltered, reaf-

[3] See Thurston Greene, op. cit., page 222.

firmed, its scope extended. But Ms. Yniguez has suffered none of the evils those words protect her from.

In his Commentaries, William Blackstone set out much of what was to become our Bill of Rights, using interchangeably the terms "due **process** of law" and "due **course** of law" and "law of the **land**." After citing a statute of 28 Ed. III "that no man shall be put to death without being held to answer by due **process** of law," he declares:

> Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due **course** of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned, [131] but by the lawful judgment of his equals, or by the law of the **land**. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king, or his council, unless it be by legal indictment, or the **process** of the common law.[4]

Ms. Yniguez's rights of freedom of speech – whatever those "rights" may be – were certainly not abridged by any violation of due process. By act of the people of Arizona, acting through the process of direct initiative, she has been kept from flouting the settled practice of her Arizona fellow citizens to conduct public business in English like all her fellow Americans. Even if this were subject to procedural safeguards of "due process," what "process" could be more "due"?

Since ratification of the Fifth Amendment in 1791, the only **constitutional** change in "due process" has been the Fourteenth Amendment. There are volumes of law, at both federal and state levels, indexed under "due process." But this is the law of the courts, not of the constitution, and therefore can be changed with no resort to the amendment process.

2. "Privileges and Immunities"

Ms. Yniguez claims no particular status or position that qualifies her for preferred treatment

[4] Blackstone, Vol. 1, pages 130-131, University of Chicago Facsimile of the First Edition of 1765-1769

within the "privileges and immunities" provisions of either 1789 or 1868.

Article IV, section 2 of the constitution provides:

> The Citizens of each **State** shall be entitled to all Privileges and Immunities of citizens in the several states.

The Fourteenth Amendment is a corollary:

> No **State** shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Taken together, these two provisions facilitate movement across state lines without fear of recrimination. Now citizens can move as freely as could those to whom "privileges and immunities" were previously granted. But two questions are left unanswered. First: who were the original recipients? It was the few, not the many. The very concept of a privilege (for the **few**) is something not available to the **many**: in 1492, Christopher Columbus from King Ferdinand and Queen Isabella of Spain. In 1609, the Treasurer and Company of Virginia from James I. From Charles I in 1620, The Council of the Colony of Plymouth and the Council of the Massachusetts Colony in 1629; also to Sir Robert Heath for all churches in the county palatine of Durham, England. In 1640, from Charles I to the Bishop of Durham and the Province of Maine. In 1665, from Charles II, all churches in Carolina to the Bishop of Durham, England. In 1676, to the proprietors of New Jersey from James I to the Duke of York, and from Charles

II in 1681 to William Penn, the Province of Pennsylvania.[5]

The Continental Congress in 1774 declared that the English colonies were "entitled to all the immunities and privileges granted & confirmed to them by royal charters, or secured by their several codes of provincial laws."[5]

The Articles of Confederation (1777) not only granted "privileges and immunities" to citizens of all states, but also (as though in addition) "free ingress and egress" across state lines. Alexander Hamilton (ever the litigator) saw "privileges and immunities" as grounds for diversity jurisdiction in the federal courts (Federalist Papers 11, 12). The Massachusetts constitution of 1780 declared that the President and Fellows of Harvard College "should have all the privileges and immunities" they then had.[5]

The answer to the above question on the identity of the initial privileged persons leads to a second question, which is necessarily in two parts. The first part is: how was "privileges and immunities" understood in 1789 when the constitution was ratified? The second part is: how were those very same words understood in 1868 when the Fourteenth Amendment was ratified?

We have two dependable lexicographical sources: The Encyclopedia Britannica of 1771 and Noah Webster's dictionary of 1828 (after the event, but proximate). The definitions are:

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[5] For compilation of appropriate quotations relating to the above paragraphs, see Thurston Greene, op. cit., pages 602-612.

Encyclopedia Britannica:

> **Privilege**, in law, some peculiar benefit granted to certain persons or places, contrary to the usual course of the law. Privileges are said to be personal or real. Personal privileges are such as are extended to peers, ambassadors, members of parliament and of the convocation, and their menial servants, etc.
>
> **Immunity**, a privilege or exemption from some office, duty, or imposition, as an exemption from tolls, etc. Immunity is more particularly understood of [sic] the liberties granted to cities and communities.

Webster's American Dictionary of the English Language (1828):

> **Privilege**. 1. A particular and peculiar benefit or advantage enjoyed by a person, company or society, beyond the common advantages of other citizens. A privilege may be a particular right granted by law or held by custom, or it may be an exemption from some burden to which others are subject. The nobles of Great Britain have the *privilege* of being triable by their peers only. Members of parliament and of our

> legislatures have the *privilege* of exemption from arrests in certain cases. The powers of a banking company are *privileges* granted by the legislature. 2. Any peculiar benefit or advantage, right or immunity, not common to others of the human race. Thus we speak of national *privileges*, which we enjoy above other nations. We have ecclesiastical and religious *privileges* secured to us by our constitutions of government. *Personal privileges* are attached to the person; as those of ambassadors, peers, members of legislatures, *etc*. *Real privileges* are attached to place; as the *privileges* of the king's palace in England. 3. Advantage; favor; benefit.
>
> **Immunity**. 1. Freedom or exemption from obligation. To be exempted from observing the rites or duties of the church, is an *immunity*. 2. Exemption from any charge, duty, office, tax or imposition; a particular privilege; as the *immunities* of the free cities of Germany; the *immunities* of the clergy. 3. Freedom; as an *immunity* from error. (Italics in original.)

By the time the Fourteenth Amendment was adopted in 1868, we had fuller definitions in Webster's 1864. About that dictionary, it was claimed:

> But far more important, though less spectacular, was the acceptance of Webster in publishing offices, courts, legislatures, schools, business houses, and other official and semiofficial centers of usage. The Government Printing Office itself hung up signs for its editors, compositors, and proof-readers, "FOLLOW WEBSTER." New York newspaper practice, shortly followed by that of the rest of the country, centered around Webster. Textbook publishers issued millions of copies of schoolbooks based on Webster. The *Atlantic Monthly* (under Howells) followed Webster in the very heart of Boston.
>
> The West Point cadets were furnished with a copy of Webster for each room — and required to keep it in good condition. Schools in state after state and city after city (prodded by a well-organized "adoption campaign" from Springfield) standardized on Webster. Legislatures made Webster their

> authority by resolution, and courts followed this lead, **right up to the Supreme Court of the United States.** (Emphasis added.) In every executive department of the Federal Government Webster was the authority.
>
> As early as the end of 1870, indeed, the *New York Tribune* could report with literal truth, "The *Unabridged* is generally regarded as the dictionary of highest authority in the language, and has a sale all over the civilized world. It is regularly issued in London, and in English, as well as American Courts of Justice, is considered as the leading authority on the meaning of words.[6] (Italics in original.)

The definitions in the 1864 Webster's was as follows:

> **Privilege**, n. A peculiar benefit or advantage; a right or immunity not enjoyed by others or by all; special enjoyment of a good, or exemption from an evil or burden; prerogative; advantage. *Question of privilege*

[6] Noah's Ark by Robert Keith Leavitt, a house publication of G. & C. Merriam Company in celebration of their first hundred years of dictionary publication, 1947.

(Parliamentary Usage), a question which concerns the security of a member of a legislative body in his special privileges as such. — *Water privilege,* the advantage of a water-fall in streams sufficient to raise water for driving water-wheels, or a place affording such advantage. [*U.S.*] — *Writ of privilege (Law),* a writ to deliver a privileged person from custody when arrested in a civil suit, *Blackstone.* Syn. — Prerogative; immunity; franchise; right; claim; liberty. — Privilege, Prerogative. *Privilege,* among the Romans, was something conferred upon an individual by a private law; and, hence, it denotes some peculiar benefit or advantage, some right or immunity, not enjoyed by the world at large. *Prerogative,* among the Romans, was the right of voting first; and, hence, it denotes a right of precedence, or of doing certain acts, or enjoying certain privileges, to the exclusion of others. It is the *privilege* of a member of Congress not to be called in question elsewhere for words uttered in debate. It is the *prerogative* of the president to ratify treaties, with the consent of the Senate. It is the *prerogative* of a parent to govern and direct his offspring.

> **Immunity,** n. 1. Freedom from an obligation; exemption from any charge, duty, office, tax, or imposition; a particular privilege; as, the *immunities* of the clergy. Granting great *immunities* to the commons, they prevailed so far as to cause Palladius to be proclaimed successor. (Italics in original.)

The two words are used quite differently today, doubtless reflecting, as lexicographers must, changing usage. A good example is the fifth definition of privilege in the 1987 Random House dictionary:

> 5. any of the rights common to all citizens under a modern constitutional government: *We enjoy the privilege of a free people.* (Italics in original.)

That is hardly the way the word was understood in 1868. Laws have to be written in contemporaneous (not futuristic) words. They cannot be amended by changing the usage later.

A "qualified" statement used to mean one that is modified or limited or restricted in some way, such as a "qualified endorsement." Today (as used in federal tax legislation), "qualified" means an act (such as a waiver) that is **un**qualified in any way. "This" used to mean (as in frontier dialect) "this-here" and "that" used to mean "that-there." Today they have been reversed. A "gifted" child used to be one born with a certain talent; today "gifted" has replaced "given" as the past participle of the verb "to give," and we

speak of property that has been "gifted." Employees used to be "discharged"; now they are "terminated" meaning, it must be supposed, that their employment is terminated. In federal statutory language, we now "gross up" (instead of "mark up") the value ascribed to certain assets, and we "grandfather" (now a verb) pre-existing conditions in order to avoid retroactivity of laws. Recently we have been using the word "perception" when we used to use "understanding." "Terrific" has come to mean "splendid," while only a short while ago it meant something that struck terror, like a stroke of lightning. "Awful" is no longer an adjective meaning to inspire with wonder; now it is merely an intensive adverb. Modern dictionaries are replete with definitions marked "obsolete," and those marked "colloq." a while ago now appear shorn of that degrading adjective, and are at last accepted in respectable linguistic society. The use of quotation marks to indicate the author's disavowal of a word's use has been largely abandoned and the misused word thus invested with legitimacy until "liberated" means "conquered" and "politically correct" means whatever the user wants it to mean.

As put by Judge Learned Hand (sitting at nisi prius in Hotchkiss v. National City Bank of New York in 1911, 200 Fed. 287 at 293 [5]), in a case involving the interpretation of a brokerage contract:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words,

> which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, **he would still be held**, unless there were some mutual mistake, or something else of the sort.

As reported in the Year Books: "It is a trite learning that the thought of man is not triable, for the devil himself knows not the thought of man." (Brian, in YB 17 Edw. IV, 1, quoted by Judge Hand, supra page 18.)

CONCLUSION

We need but look about us to see the folly of Ms. Yniguez's position. To our north, Canada faces fragmentation because a three-to-one majority in the Province of Quebec, having imposed the French language on the English-speaking minority, now threatens separation from the rest of Canada if its demands for near-independence are not met. To the southeast we hear cries from Puerto Rico for statehood with Spanish vernacular freedom. To the west we see our largest state rapidly becoming polyglot. If we look half way around the globe, we see India, the largest self-governing nation in the world, rent with dissension with fourteen different languages being recognized by its constitution. At the same time, by natural forces English has become the international language of foreign trade, aviation,

travel, and diplomacy through natural evolution, not by fiat.

The biblical city of Babel was one "where construction of a tower intended to reach heaven was ended when the builders became unable to understand each other's language."[7] Our historical counterweight was Noah Webster's "Blue-Book Speller" that sold more than seventy million copies in the nineteenth century.[8] It enabled immigrants of whatever nationality to speak not just to each other, but to immigrants from other lands, in their new common language. There was nothing they could not build — including the American culture itself.

Will the Tower of Babel prevail over Noah Webster? It might, unless linguistic divergence comes to an end.

The Ninth Circuit Court of Appeals decision should be reversed.

Respectfully submitted:

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[7] American Heritage College Dictionary, Third Edition, 1993.
[8] Noah's Ark by Robert Keith Leavitt, op. cit., page 6.

APPENDIX

APPENDIX

The following argument is appended lest the court take under consideration, sua sponte, the application of the "equal protection" provision of the Fourteenth Amendment.

Equal Protection of the Laws

This was the only new right furnished by the Fourteenth Amendment. The adjective "equal" is self-defining. But what is it to "protect" a right? The word appears nowhere else in the constitution.[9] But in 1868 when the amendment was ratified, as well as in 1866 when the 39th Congress debated it, we had the 1864 Webster's dictionary which defined it clearly thus: "To cover or **shield** from danger or injury; to **defend**; to **guard**; to **preserve** in safety." The law that protects one protects all: rich or poor, sick or well, better or worse, anglophone or not, citizen or non-citizen. No state may "deny to any person within its jurisdiction" whatever protection is afforded to any other person by state law. Clearly any rights bestowed, beyond this clear-cut statement on **protection**, must follow the normal procedure governing the legislatures of the several states. Without the amendment, many of the evils for which the civil strife of 1860-1865 was endured would have come to naught. Yet the stricture was not so severe but that the nine southern states could accept it as a condition to readmission. The wording displays a

[9] See "The Exhaustive Concordance to the United States Constitution" by Dennis Buzzocco, Firm Foundation Press, Chattanooga, TN, (1994).

careful balance between the ideal of those unionists who may have wished for more, and their realization that to have asked for more might have jeopardized their hope of getting anything.

Even if Ms. Yniguez could show that "speech" (as she uses the term) is a freedom somehow protected under Article I, she has not made a case under "equal protection." To have done so, she would have had to show that her language (Spanish) had been singled out from all other foreign languages to be denied acceptability under the Arizona law. That did not happen. Our native language and that language only was protected. That language protects us all – including Ms. Yniguez herself.